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UNI WALL ARCHITECTURAL PRODUCTS & SERVICES SDN BHD

v.

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GLOBAL UPLINE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: D-22-1531-2009]
8 JUNE 2011

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CIVIL PROCEDURE: *Summary judgment - Application for - Triable issues - Whether arose - Whether there was total failure of consideration - Whether issues raised by defendant had merits - Whether application should be allowed*

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The plaintiff's claim against the defendant was founded on a dishonoured cheque. The plaintiff pleaded that on or about the end of 2008, the defendant issued to the plaintiff a Bank Muamalat Malaysia Berhad cheque for the sum of RM1,500,000 ('the said cheque'). The plaintiff presented the said cheque for payment at the plaintiff's bank. The cheque was however dishonoured. The plaintiff subsequently gave a notice of dishonour to the defendant. There were several reminders and demands for payment of the said sum of RM1,500,000 but as the plaintiff received no reply from the defendant, the plaintiff through its solicitors, issued a letter of demand. With no response forthcoming, the plaintiff commenced this suit and proceeded to apply for summary judgment. The defendant, however, submitted that this claim was not suitable for summary judgment.

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Held (allowing plaintiff's application for summary judgment):

(1) The defendant had not alleged fraud, illegality or failure of consideration in the defendant's affidavits filed to oppose this application. The defendant contended that there were lots of defective works carried out by the plaintiff and as such the defendant was not obliged to pay the sum stated in the cheque. However, the alleged defective works were without merits. The total works completed by the plaintiff was approximately 90%. Even assuming for a moment that there were defective works, which was being denied by the plaintiff,

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this would come under the scheme of rectification works and the safety net of the retention sum being held by the defendant. There was no total failure of consideration that would have the effect of vitiating the plaintiff's claim under the dishonoured cheque. Thus, the issues raised by the defendant did not amount to triable issues that would justify this claim by the plaintiff to go for trial. (paras 10, 12 & 13)

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Development & Commercial Bank Bhd v. Brimal Sdn Bhd & Anor [1991] 2 CLJ 1514; [1991] 2 CLJ (Rep) 554 HC ***(refd)***

Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [1999] 2 CLJ 749 HC ***(refd)***

Jebsen & Jessen (Singapore) Pte Ltd v. Yeung Hoi Kwang [1978] 1 LNS 73 HC ***(refd)***

Lee Khoi Foo v. Lim Chai Hock [1994] 2 CLJ 401 HC ***(refd)***

Lim Tjoen Kong v. A-B Chew Investments Pte Ltd [1991] 3 CLJ 1945; [1991] 4 CLJ (Rep) 550 CA ***(refd)***

Malayan Banking Bhd v. Foo See Moi [1981] 1 LNS 95 FC ***(refd)***

National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Nova (Jersey) Knit Ltd v. Kammugarn Spinnerei GmbH [1977] 2 All ER 463 ***(refd)***

Phua Chai Syn @ Phua Tai Tin v. United Establishment SB [1999] 1 LNS 187 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14

Other source(s) referred to:

Supreme Court Practice Vol 1, *London Sweet & Maxwell Ltd*, 1979, p 142

For the plaintiff/applicant - CJ Siew; M/s Douglas Yee
For the defendant/respondent - Azad Bashir; M/s Shafee & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Lee Swee Seng JC:

Prologue

B **[1]** The core of the plaintiff's claim against the defendant is founded on a dishonoured cheque. The plaintiff contended that for such a claim, the only valid defence available to the defendant is that of fraud, illegality or a total failure of consideration. In short, it is not relevant the circumstance and cause for which the C cheque is issued unless there is hovering over it the elements of fraud, illegality or a total failure of consideration. That being the stand of the plaintiff, it proceeded promptly with a summary judgment application.

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Parties

[2] Consistent with that claim, the plaintiff's statement of claim is carefully crafted to cover only the elements required to found a claim on dishonoured cheque. The plaintiff pleaded that on or about the end of 2008, the defendant issued to the plaintiff a E Bank Muamalat Malaysia Berhad No. 307279 dated 2 December 2008 for the sum of RM1,500,000 ("the said cheque"). The plaintiff stated that it is a "holder in due course" and/or "drawee" of the said cheque whereas the defendant is the "drawer" and/or "issuer" of the same.

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Problem

[3] On 2 December 2008 the plaintiff presented the said cheque for payment at the plaintiff's bank, HSBC Bank Malaysia Berhad G at Kuala Lumpur. The cheque was however dishonoured and returned with the remark "refer to drawer".

[4] The plaintiff subsequently gave a notice of dishonour dated 24 December 2008 to the defendant and also suggested to the H defendant that the plaintiff shall bank in the said cheque again on 10 January 2009 for payment.

[5] As the plaintiff received no reply from the defendant, the plaintiff proceeded to present the said cheque on 14 January 2009 by depositing it into the same HSBC account. Unsurprisingly the I said cheque was once again dishonoured and a copy of the said notice of returned cheque was given by the HSBC Bank to the plaintiff. The plaintiff immediately notified the defendant and gave notice of dishonour dated 19 January 2009 to the defendant.

[6] There were several reminders and demands for payment of the said sum of RM1,500,000 and so finally the plaintiff through its solicitors, Messrs Douglas Yee, issued a letter of demand dated 7 July 2009. With no response forthcoming the plaintiff commenced this suit and proceeded to apply for summary judgment.

Prayer

[7] The plaintiff prayed by encl. 10 in an application for summary judgment under O. 14 of the Rules of the High Court 1980 (RHC) for the following:

(a) The sum of RM1,500,000;

(b) Interest at the rate of 8% per annum on RM1,500,000 from 2 December 2008 until date of judgment;

(c) Interest at the rate of 8% per annum on the judgment sum from date of judgment to date of realisation;

(d) Costs.

Principles

[8] In hearing an application for summary judgment, I must follow the dicta of the Federal Court in the case of *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 where it was held as follows:

> In every application under O. 14 the first considerations are (a) whether the case comes within the Order and (b) whether the Plaintiff has satisfied the preliminary requirements for proceeding under O. 14. For the purposes of an application under O. 14 the preliminary requirements are:
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> (i) the Defendant must have entered an appearance;
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> (ii) the Statement of Claim must have been served on the Defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the O. 14.
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> .... If however, these considerations are satisfied, the Plaintiff will have established a *prima facie* case and he comes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him.

[9] I agree with the learned counsel for the plaintiff/applicant Mr CJ Siew that the plaintiff having fulfilled all the preliminaries requirements for the application, the burden is on the defendant to show a triable issue. The defendant, through its learned counsel Mr Azad Bashir, submitted that this claim is not suitable for summary judgment for the following reasons:

> The said Cheque was not honoured by the Defendant because the Cheque had been issued for payment of a project in which the Plaintiff was the sub-contractor with the Defendant being the main contractor for the proposed 12 storey hotel cum 12 storey office tower on Lots 3186, 3187, 3281 & part of Lot 7143, Block 16, KCLD, Kuching, Sarawak ("the Project"). The Defendant contended that there are lots of defective works carried out by the Plaintiff and as such the Defendant is not obliged to pay the sum stated in the Cheque and the Defendant has rightfully stopped the said Cheque for payment. Based on a report by a consultant on the various alleged defective works, the Defendant has also filed a Counter Claim in this action.

[10] However, as rightly pointed out by learned counsel for the plaintiff, the defendant has not alleged fraud, illegality or failure of consideration in the defendant's two affidavits filed to oppose this application. A case in point is that of *Development & Commercial Bank Bhd v. Brimal Sdn Bhd & Anor* [1991] 2 CLJ 1514; [1991] 2 CLJ (Rep) 554 at p. 557 where summary judgment was allowed to be entered against the defendant based on a dishonoured cheque:

> The question for the Court to consider now is whether the plaintiff is entitled to enter summary judgment against the defendant under O. 14 of the Rules of the High Court 1980. *The Supreme Court Practice 1985*, Vol. 1, at p. 144 states:
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> > In an action on a bills of exchange, the mere assertion by the defendant of fraud or illegality affecting the bill is not in itself enough to entitle him to leave to defend, but equally if the defendant sets out facts supporting a case of fraud or illegality affecting the bill, the mere assertion by the plaintiff that he took the bill in good faith and for value will not in itself deprive the defendant of his entitlement to leave to defend but if the plaintiff's claim to be a *bona fide* holder for value is uncontested or he can establish such claim by unchallenged or unchallengeable contemporary documents, the plaintiff is entitled to judgment. Bills of exchange are treated as cash and, unless there are

> exceptional circumstances, where there is an action between the immediate parties to a bill of exchange, judgment will not be held up by virtue of a counter claim by the defendant.

In *Nova (Jersey) Knit Ltd v. Kammugarn Spinnerei GmbH* [1977] 2 All ER 463, Lord Wilberforce in his speech at p. 470 said:

> ... When one person buys goods from another, it is often, one would think generally ... important for the seller to be sure of his price: he may (as indeed the appellants here have) bought the goods from someone else whom he has to pay. He may demand payment in cash; but if the buyer cannot provide this at once, he may agree to take bills of exchange payable at future dates. These are taken as equivalent to deferred installments of cash. Unless they are to be treated as unconditionally payable instruments ... which the seller can negotiate for cash, the seller might just as well give credit. And it is for this reason that English law ... *does not allow cross-claims, or defences except such limited defences as those based on fraud, invalidity, or failure of consideration, to be made. In my opinion, this is straightforward case of an action on bills, to which no admissible defence has been put forward* ...
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> I respectfully agree with the passages quoted above. *In the present case, neither fraud, nor illegality or failure of consideration has been pleaded in the statement of defence I have carefully considered the pleadings, the affidavits filed and the submissions of Counsel in this case and have come to the conclusion that the defendant has no defence to the plaintiff's claim*. (emphasis added)

[11] Along a similar vein the case of *Lee Khoi Foo v. Lim Chai Hock* [1994] 2 CLJ 401 at p. 404, his Lordship Chong Siew Fah J (as he then was) held:

> With respect, I do not think that case is applicable. In that case the claim was on a contract for services rendered; the defendant counter claimed alleging breach of contractual obligations. In our instant case the plaintiff's action is on a promissory note and between the immediate parties. Bill of exchange are treated as cash. If a counterclaim arises out of quite separate and distinct transactions or there is no connection between the claim and the counterclaim, judgment should be given for the plaintiff without a stay pending trial of the counterclaim.

[12] I agree with the learned counsel for the plaintiff that defective works in the project, even if it be true, does not amount to failure of consideration. The meaning of failure of consideration is explained in the case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 at pp. 282-283 where the Federal Court speaking through his Lordship Gopal Sri Ram FCJ said.

> ... it is now settled that there is, at common law, a right to rescind a contract in very limited circumstances. In essence it is the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48, Viscount Simon LC said:
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> > .... in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasicontractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled. If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled...
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> What has to be added to the learned Lord Chancellor's view is the qualification:
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> > ... that failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract ... but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due. (*Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 All ER 883, per Lord Goff of Chieveley)
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> In other words, when deciding whether there is in a given case total failure of consideration, the court must first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in default. The test is not

whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety. The facts of *Stocznia Gdanska* illustrate the proposition.

The plaintiffs were Polish shipbuilders. They entered into several agreements to design, build, complete and deliver ships for the second defendant, a wholly-owned subsidiary of the first defendant. Payment was to be made in instalments. The defendants defaulted and the plaintiffs held them in breach. They sued to recover damages for breach of contract. The defendants argued that that there was a total failure of consideration as they had received no vessel from the plaintiffs. The House of Lords held that the plaintiffs' promise when properly construed was not merely to deliver the ships but to also design them. This latter part of the promise the plaintiffs had performed. There was accordingly no total failure of consideration.

[13] The plaintiff's counsel argued that, the alleged defective works are without merits if one were to examine the contemporaneous documents in exh. A-8 of the plaintiff's 2nd affidavit in reply where the defendant had clearly certified that as at January 2009, the total works completed by the plaintiff was approximately 90%. Even assuming for a moment that there were defective works, which is being denied by the plaintiff, this would come under the scheme of rectification works and the safety net of the retention sum being held by the defendant. There is no total failure of consideration that would have the effect of vitiating the plaintiff's claim under the dishonoured cheque.

[14] I am not unaware of the cases of *Phua Chai Syn @ Phua Tai Tin v. United Establishment SB* [1999] 1 LNS 187 where it was stated that:

It is a well-accepted principle that if the consideration for a bill of exchange wholly fails then as between the immediate parties the contract created by the instrument is discharged.

[15] I was also referred by the defendant's counsel to the case across the causeway in *Jebsen & Jessen (Singapore) Pte Ltd v. Yeung Hoi Kwang* [1978] 1 LNS 73; [1978] 2 MLJ 96 where his Lordship Kulasekaram J where held as summarised in the headnote:

On the evidence the issue of the cheque was clearly affected with fraud and that being so the onus was on the plaintiffs to prove that value had been given for the cheque. The onus was shifted

A to the plaintiffs to show that they had delivered the goods to the defendant and on the evidence this onus had not been discharged, and the action must be dismissed.

[16] In a gallant attempt to justify an unconditional leave to B defend the defendant had sought to introduce some exchange of letters marked "without prejudice" between the parties where the defendant contended that there was a negotiated settlement to rectify defective works. I am satisfied that there was no concluded settlement reached and as such the "without prejudice" letters C cannot be produced as evidence in court. As was held by the Federal Court in *Malayan Banking Bhd v. Foo See Moi* [1981] 1 LNS 95; [1981] 2 MLJ 17 at p. 18:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in D order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in E another document which would then be the evidence of the agreement.

[17] See the following cases in support of that proposition:

F *Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors* [1999] 2 CLJ 749;

Lim Tjoen Kong v. A-B Chew Investments Pte Ltd [1991] 3 CLJ 1945; [1991] 4 CLJ (Rep) 550.

G **[18]** In a further spirited attempt to deny the plaintiff's application for summary judgment on a dishonoured cheque, defendant's counsel had referred to a passage in the Supreme Court Practice Vol 1, 1979, *London Sweet & Maxwell Ltd*, p. 142 where it was stated:

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> Leave to Defend-Unconditional leave ... So also in an action on a bill of exchange where the defendant sets up the defence that the bill was given without valuable consideration ... (*Wing v. Thurlow* 10 T.L.R. 53, 151).

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[19] In response to that, I can do no better than to repeat the reminder issued by his Lordship Mohd Azmi SCJ in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 at p. 19:

> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Pronouncement

[20] Having considered the issues raised by the defendant, I found that they do not amount to triable issues that would justify this claim by the plaintiff to go for trial. I therefore allowed the plaintiff's application for summary judgment for the sum stated in the dishonoured cheque for RM1,500,000 together with interest and costs as prayed.